Nos. 2535, 2536, 2537

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,
Appellants,

vs.

E. THOMPSON,
Appellee.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal From the United States District Court for the Southern District of California, Southern Division.

CHARLES W. SLACK,
Alaska Commercial Building, San Francisco,
JOSEPH K. HUTCHINSON,
First National Bank Building, San Francisco,
Solicitors for Appellants.

Filed this .....*day of January, 1915.*

Filed JAN 25 1915

FRANK D. MONCKTON, Clerk.

By .....*Deputy Clerk.*

F. D. Monckton,

PERNAU PUBLISHING COMPANY

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Statement of the Case.

There are three cases before this court each of which is on appeal from an order granting an injunction pendente lite, in which the above-named parties are respectively appellants and appellee. The facts presented in each of the three appeals are substantially the same. The same similarity applies to the questions presented by the appeals. For the sake of brevity and to avoid confusion, appellants embody herein a statement of facts taken from the bill on file in Case No. 2537, and a discussion of

authorities which will be of general application to all appeals. The few particulars in which the respective records on the three appeals differ will be appropriately noted.

Three bills in equity of complainant and appellee were filed in the District Court on November 24th, 1914. (Tr., p. 35.) The allegations that are common to each of the bills, and upon which temporary restraining orders and injunctions pendente lite were sought, are as follows:

1. That in 1910 complainant jointly with seven others, one Fursman, one Huff, one Baker, one Waymire, one Perkins, one Smith, and the defendant Pack, located certain placer mining claims on Searles Borax Lake in San Bernardino County, California.* (Tr., p. 4.)

2. That complainant is now, and ever since the date of the locations has been, owner of an undivided one-eighth interest in said claims. (Tr., p. 4.)

3. That neither complainant nor the said defendants, or either of them, are now, nor for a long time prior to the commencement of this suit, have they, or either of them, been in the actual possession of the said claims. (Tr., p. 4.)

4. That in September, 1914, defendants caused to be served on complainant a Notice of Forfeiture, a copy of which is attached to the bill of complaint as "Exhibit A", (Tr., p. 6) drawn pursuant to Sec-

* In case No. 2535 the number of claims is placed at 175; in case No. 2536 at 12; and in case No. 2537 at 44.

tion 2324 U. S. R. S. By the terms of the Notice of Forfeiture attached to the bill of complaint in case No. 2537 notice is given to the complainant that the defendant Pack expended during the year 1912 the sum of $4400, in amounts of $100, for labor and improvements, upon each of the 44 claims described in the bill of complaint; that said $4400 was expended by said Pack for the purpose of complying with the requirements of Section 2324, U. S. R. S., concerning the performance of annual labor upon mining claims;* that throughout the year 1912 said Pack was the owner of an undivided one-eighth interest in said claims, and that subsequent to the making of said expenditures, transferred his one-eighth interest to the defendant Schuler, who, in turn, subsequently transferred said interest to the defendant Hutchinson, who is now the owner thereof. That after demand made in said Notice of Forfeiture upon complainant for contributive payment of complainant's proportion of said sum expended by defendant Pack, to wit: The sum of $550 or one-eighth of said expenditures, further notice is given to the complainant that failure to contribute said sum of $550 within ninety days of the personal service of the Notice upon the complainant, will result in complainant's interest in said mining claims becoming vested in the parties signing said

*In case No. 2535 the number of claims is placed at 175; the amount expended at $5600; the amount contribution of which is asked at $700, and the years for which expended as 1911 and 1912; in case No. 2536 the number of claims at 12, the amount at $1200; the amount to be contributed at $150, and year as 1911. These differences occur throughout the bills.

Notice. The Notice is signed by each of the defendants. (Tr., pp. 31-35.)

5. That defendant Pack did not expend in 1912, or during any other year, or at any other time, or at all, $4400, or any other sum, of his own money or funds upon said claims for labor and improvements, or for any purpose whatsoever. (Tr., p. 7.)

6. That said Pack did not expend in 1912, or during any other year, $100 of his own money or funds upon each or any of said claims for labor and improvements, or for any purpose whatsoever. (Tr., p. 7.)

7. That said Notice of Forfeiture does not describe the kind, character, or nature of the labor and improvements claimed to have been performed upon said claims during 1912. (Tr., p. 8.)

8. That complainant is unable to ascertain from said Notice of Forfeiture whether—

(a) Pack claimed to have actually expended of his own money or funds in labor and improvements $100 upon each of said claims; or—

(b) Whether he expended $5600 on all of them; or—

(c) Whether he claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done upon said claims the annual representation work for 1912. (Tr., p. 8.)

9. That complainant cannot ascertain from said Notice of Forfeiture whether—

(a) The amount claimed to have been expended by said Pack of his own money or funds upon said claims, if he ever expended any money at all thereon, was of the value of $100 for each claim; or—

(b) Whether of the value of $4400 for all the claims; or—

(c) Whether such labor and improvements increased the value of each of said claims $100; or—

(d) Whether they increased the value of them all $4400; or—

(e) Whether such labor and improvements tended in any way to develop said claims. (Tr., pp. 8-9.)

10. On information and belief that defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said claims for 1912, expended a greater portion or all of such money in—

(a) The transportation of men and supplies to said claims; and—

(b) In furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported to said claims for the purpose of performing said work during said year. (Tr., p. 9.)

11. That said Notice is executed, made and signed by defendants Pack, Schuler and Hutchinson. (Tr., p. 9.)

12. That said Notice discloses on its face—

(a) That neither the defendant Schuler nor Hutchinson had any interest in said claims in 1911 and 1912, or during the time it is claimed that defendant Pack expended money on said claims; and—

(b) That neither the defendant Schuler nor Hutchinson ever expended any of the money named in the Notice of Forfeiture. (Tr., p. 9.)

13. That on or about December 25th, 1913, defendant Schuler made, executed, acknowledged and delivered her deed and conveyance to one Shellito, whereby said defendant Schuler conveyed to Shellito all her right in said claims. (Tr., p. 10.)

14. That on or about January 14th, 1914, defendant Schuler assumed to convey to defendant Hutchinson the same interest that she had theretofore conveyed to said Shellito. (Tr., p. 10.)

15. That said defendant Hutchinson at the time of receiving such conveyance, was fully informed and had full knowledge that said defendant Schuler had conveyed all right described therein to said Shellito, prior to the execution of the said conveyance from Schuler to Hutchinson. (Tr., p. 10.)

16. That defendant Hutchinson took said conveyance from defendant Schuler—

(a) For the sole and only use and benefit of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or for all or a part of them; and—

(b) Not for his own use and benefit; and—

(c) In pursuance of a combination and conspiracy by and between these defendants and the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, wherein and whereby the said defendants and the said corporations confederated and combined together to injure complainant and to deprive and defraud him of all his right in said claims. (Tr., pp. 10-11.)

17. On information and belief that the pretended transfer of the one-eighth interest in said claims by defendant Schuler to defendant Hutchinson, if such transfer was made at all, was made pursuant to and in order to carry out a combination and conspiracy to injure complainant and to deprive and defraud him of all his right in said claims. (Tr., p. 11.)

18. That said pretended transfer to defendant Hutchinson by defendant Schuler was made and done, if made and done at all, wholly and totally without a valuable or other consideration. (Tr., p. 11.)

19. That, if any consideration at all was paid by defendant Hutchinson to defendant Schuler for said transfer, the same was advanced and paid—

(a) By the Foreign Mines and Development Company, or by the American Trona Company, or by the California Trona Company, or by part or all of them, or—

(b) By some person or persons authorized by them, or part or all of them, or acting for them, or for part or all of them, and on their behalf, or on the behalf of part or all of them. (Tr., p. 11.)

20. That defendant Hutchinson took the title to said one-eighth interest, if he took the title at all—

(a) For the sole benefit and use of the said Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them, and—

(b) Not for his own use and benefit. (Tr., pp. 11-12.)

21. That defendant Hutchinson now claims to hold said title to said one-eighth interest in said claims, if such title ever passed to him,—

(a) For the sole and only use and benefit of the said Foreign Mines and Development Company, the said American Trona Company, the said California Trona Company, or for the sole use and benefit of part or all of them, and—

(b) Not for his own use and benefit. (Tr., p. 12.)

22. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, claim rights and interests in said mineral lands, covered by said placer locations so made and recorded by complainant and others. (Tr., p. 12.)

23. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have for some years last past been endeavoring to defeat the locations so made by complainant and others. (Tr., p. 12.)

24. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have, and each and every of them has, as complainant is informed and believes, fraudulently attempted to procure the right of defendant Pack in said locations so made by complainant and others, for the express purpose, and for none other, of—

(a) Using said interest of defendant Pack in said locations in such a way and manner as to destroy all of complainant's right therein, and—

(b) To defraud complainant out of all interest in said claims. (Tr., pp. 12-13.)

25. On like information and belief that defendant Hutchinson has been acting as agent, representative and attorney of said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each

of them, in endeavoring to deprive and defraud complainant of his right in said locations. (Tr., p. 13.)

26. That defendant Hutchinson, under the direction and orders of said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each of them, fraudulently obtained said transfer of said one-eighth interest in said claims, if he obtained said transfer at all, from defendant Schuler, in pursuance to the combination and conspiracy entered into and carried on by and between said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each of them, and the said defendants, and each of them, to injure complainant and defraud and deprive him of all right to said claims. (Tr., p. 13.)

27. That in further pursuance of said combination and conspiracy, and under the orders and direction of said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or all or part of them, the defendants caused to be served on complainant said Notice of Forfeiture. (Tr., pp. 13-14.)

28. That the fraudulent transfer of said one-eighth interest by defendant Schuler to defendant Hutchinson, if any transfer was made at all, and the serving of said Notice of Forfeiture on complainant, was all done in pursuance to and in the carrying out of a combination and conspiracy

entered into by and between said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or all or part of them, and said defendants and each of them, confederated together for the purpose of injuring complainant and depriving and defrauding him of all his rights in said claims. (Tr., p. 14.)

29. On information and belief that said Notice of Forfeiture was prepared and served upon complainant pursuant to and in furtherance of such combination and conspiracy between defendants and the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company. (Tr., p. 14.)

30. On information and belief that defendant Pack never, during 1911 and 1912, or at any other time, expended or caused to be expended, the sum of $4400 of his own funds or money, or any other sum or amount, in and upon said claims or upon one or any of them, for any purpose whatsoever. (Tr., pp. 14-15.)

31. On information and belief, that neither defendant Pack nor any of the defendants, or their co-conspirators, are entitled to any contribution from complainant in any sum whatsoever. (Tr., p. 15.)

32. Complainant is informed and believes that none of the money defendant Pack claims to have expended for representation work, or for labor and improvements, or labor or improvements, on the

claims, or any thereof, if expended by said Pack at all, was expended by him for the annual representation and assessment work upon said claims, or any of them, as required by law. (Tr., p. 15.)

33. That defendant Pack paid the money set forth in said Notice of Forfeiture, if he paid any money at all, for—

(a) Certain goods, wares and merchandise furnished to certain laborers employed by complainant and his co-locators doing assessment work on said claims in the years 1911 and 1912, and for—

(b) Automobile hire in transporting said laborers and supplies to and from said claims. (Tr., p. 15.)

34. That in January, 1913, one Colquhoun, through his attorney, defendant Hutchinson, filed suit against defendant Pack, one Henry E. Lee, and T. O. Toland, in the Superior Court of the State of California in and for the City and County of San Francisco. (Tr., pp. 15-16.)

35. That in the verified complaint said Colquhoun alleges—

(a) That he is assignee of C. J. & E. E. Teagle;

(b) That $750 is due him for certain goods, wares and merchandise sold and delivered to said Pack and the other defendants in said suit during 1911 and 1912;

(c) That the same had never been paid. (Tr., p. 16.)

36. On information and belief that the said goods sued for in said action were purchased by said Pack from the said Teagles in Johannesburg, Kern County, California. (Tr., p. 16.)

36a. That the whole amount of said goods, wares and merchandise so purchased by defendant Pack from the said Teagles was $969. (Tr., p. 16.)

37. That the said Teagles in said suit admit that $219 has been paid on said account. (Tr., p. 16.)

38. On information and belief that said $750 sued for in said action constitutes part of the amount which the defendants Pack, Schuler and Hutchinson claim in said Notice of Forfeiture to have been paid by defendant Pack in 1911 for doing assessment work on said claims, and for the pretended payment of which defendants are now seeking contributions from complainant, and threatening forfeiture of his right in said claims upon his failure so to contribute, as recited in said Notice of Forfeiture. (Tr., pp. 16-17.)

39. That in February, 1914, judgment was rendered in said suit against defendant Pack, in plaintiff's favor, in the whole amount sued for. (Tr., p. 17.)

40. That said judgment has never been satisfied or discharged, either in whole or in part, or set aside, vacated, or modified. (Tr., p. 17.)

41. That in January, 1913, one Varney, by his attorney, defendant Hutchinson, filed suit against defendant Pack, Henry E. Lee and T. O. Toland,

in the Superior Court of the State of California, in and for the City and County of San Francisco. (Tr., p. 17.)

42. That in the verified complaint said Varney alleged that during 1911 and 1912 he furnished supplies and rendered services to defendant Pack and the other defendants in said suit in the sum of $4180, of which said sum only $535 has been paid. (Tr., p. 17.)

43. That in February, 1913, a judgment was entered in said action against said Pack in favor of plaintiff, in the whole amount sued for. (Tr., p. 18.)

44. On information and belief that said judgment in said suit—

(a) Is still outstanding and of record, and—

(b) Has never been satisfied, set aside, vacated or modified. (Tr., p. 18.)

45. On information and belief that said action was brought by said Varney to recover $4180 from defendant Pack, Henry E. Lee and T. O. Toland, for the use of two automobiles and supplies furnished by said Varney to defendant Pack, at his special instance and request, in 1911 and 1912, and used by defendant Pack to transport men hired by complainant and his co-locators to do the annual assessment work on said claims for said years, and supplies for said men, from said City of Los Angeles to said claims. (Tr., p. 18.)

46. On information and belief that said $4180 sued for in said action constitutes part of the

amount that the defendants claim in their Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from complainant and threatening forfeiture of his right in said claims upon his failure so to contribute, as recited in said Notice of Forfeiture. (Tr., pp. 18-19.)

47. That in September, 1913, said Colquhoun, by his attorneys, defendant Hutchinson and another, filed suit in the Superior Court of the State of California in and for the City and County of San Francisco against this complainant and one Fursman, one Huff, one Perkins, one Baker, one Waymire, one Smith, and defendant Schuler, to recover $750 alleged to be due said plaintiff for the value of certain goods, wares and merchandise. (Tr., p. 19.)

48. That in his verified complaint in said suit said Colquhoun alleges that the said Teagles assign to him the claim sued on. (Tr., p. 19.)

49. That said Colquhoun further alleges that in 1911 and 1912 the said Teagles furnished certain goods, wares and merchandise to the value of $750 to the defendants therein, including this complainant. (Tr., p. 19.)

50. That no part of said sum has been paid. (Tr., p. 19.)

51. That said suit was brought by plaintiff for the value of said goods, wares and merchandise

claimed to have been sold and delivered by plaintiff's assignors to defendant Pack in 1911 and 1912, and it is claimed that the same were used by a camp of men doing assessment work on said claims during 1911 and 1912. (Tr., p. 20.)

52. That the whole value of said goods is $969. (Tr., p. 20.)

53. That said plaintiff in said suit admitted payment of $219 on account. (Tr., p. 20.)

54. That in February, 1913, said Waymire filed his verified answer to the complaint in said action. (Tr., p. 20.)

55. That thereafter a trial was had of the issues therein. (Tr., p. 20.)

56. That after judgment had been rendered against said Waymire the said court, in August, 1914, granted said Waymire's motion for a new trial thereof. (Tr., p. 20.)

57. That plaintiff in said suit, as this complainant is informed and believes, is now prosecuting an appeal from the order of said court granting said motion for a new trial. (Tr., p. 20.)

58. On information and belief that said sum of $750 sued for in said action and the sum of $219 admitted to have been paid on account therein constitute part of the amount defendants in this suit claim in their pretended Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are

now seeking contribution from the complainant, and threaten forfeiture of his right in said claims, upon his failure so to contribute, as recited in said Notice of Forfeiture. (Tr., pp. 20-21.)

59. That in August, 1913, said Varney, by his attorneys, defendant Hutchinson and another, filed suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against complainant and one Fursman, one Huff, one Perkins, one Baker, one Waymire, one Smith, and defendant Schuler. (Tr., p. 21.)

60. That in the verified complaint in said suit said Varney alleged that during 1911 and 1912 he furnished supplies and rendered services to the defendants therein in the sum of $4170, of which said sum only $500 has been paid. (Tr., p. 21.)

61. That said action was brought by said Varney to recover the sum of $3670 from the said defendants for the use of two automobiles and certain supplies furnished by said Varney to defendant Pack at his special instance and request, in 1911 and 1912, and used by defendant Pack to transport men and supplies from the City of Los Angeles and elsewhere to the said placer mining claims. (Tr., pp. 21-22.)

62. That in October, 1913, said Waymire filed his verified answer to the complaint in said action. (Tr., p. 22.)

63. That thereafter various proceedings were had therein. (Tr., p. 22.)

64. That a trial thereof was had before the court. (Tr., p. 22.)

65. That in July, 1914, said Waymire moved the court for a non-suit in said action. (Tr., p. 22.)

66. That the motion for a non-suit was by the court granted. (Tr., p. 22.)

67. That in October, 1914, judgment was entered in favor of said Waymire. (Tr., p. 22.)

68. On information and belief that said $3670 and said $500 constitute part of the amount that the defendants in this suit claim in said pretended Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from complainant, and threaten forfeiture of his right in said claims, upon his failure so to contribute, as recited in said Notice. (Tr., pp. 22-23.)

69. That in February, 1914, one Mojica filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against complainant and his co-locators and defendant Schuler, as assignee of defendant Pack, one Henry E. Lee, and various other parties, to recover the sum of $1443.50. (Tr., p. 23.)

70. That in his verified complaint in said action said plaintiff—

(a) Pretends to be the assignee of thirty certain Mexican laborers;

(b) Pretends therein that each of said laborers had assigned to him their claims against the defendants therein for doing certain labor and work on said claims, by way of assessment work thereon, during 1912. (Tr., p. 23.)

71. That said action is now at issue in said Superior Court. (Tr., p. 23.)

72. On information and belief that said sum of $1443.50 sued for in said action constitutes a portion of the amount defendants in this suit claim in their said pretended Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing the assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from the complainant, and threaten forfeiture of his right in said claims, upon his failure so to contribute, as recited in said Notice. (Tr., pp. 23-24.)

73. That complainant is informed and believes that no part of said sum of $1443.50 sued for in said action has been paid by defendant Pack, or any one whomsoever for him. (Tr., p. 24.)

74. That a short time prior to the date when defendant Pack claimed to have expended money for the purpose of doing assessment work on said claims, as claimed in said Notice of Forfeiture, one Henry E. Lee, as the duly authorized agent and representative of complainant, and of his co-locators, paid to defendant Pack for complainant,

and for his said co-locators, in their respective proportionate shares, the sum of $1000 as a portion of their pro rata contributions for the doing of said annual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said annual assessment work thereon. (Tr., pp. 24-25.)

75. That, as complainant is informed and believes, defendant Pack did so use said sum of $1000 for said purpose in said year, and that the said amount should be credited to complainant and his co-locators in proportion to their respective interests in said claims. (Tr., p. 25.)

76. That in 1911, and prior to the time any money is claimed to have been expended by defendant Pack in his said Notice of Forfeiture, defendant Pack duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of complainant and his co-locators, in the sum of $1836. (Tr., p. 25.)

77. That said Henry E. Lee, acting as such agent for complainant and his co-locators, directed defendant Pack to use and utilize all of said money, or so much thereof as might be necessary, in the annual representation of said claims for 1911 and 1912. (Tr., p. 25.)

78. That defendant Pack agreed with said Lee that he would so utilize and use said money. (Tr., p. 25.)

79. That complainant claims that said $1836 is and should be a portion of the money expended by

defendant Pack, as described in said pretended Notice of Forfeiture. (Tr., p. 25.)

80. That said money and indebtedness was money due and owing to complainant and his co-locators from defendant Pack, duly evidenced by his written acknowledgment of such indebtedness to said Lee, the duly authorized agent of complainant and his co-locators. (Tr., pp. 25-26.)

81. That said amount should be credited to complainant and his co-locators in proportion to their respective interests in their said claims. (Tr., p. 26.)

82. That simultaneously with the service of said Notice of Forfeiture upon complainant, the defendants served upon complainant another pretended Notice of Forfeiture, by which defendants claim that defendant Pack expended in 1911 and 1912, $5600 for labor and improvements on 175 placer claims among which are included the claims described in this bill.* (Tr., p. 26.)

83. That by the terms of said other pretended Notice of Forfeiture the defendants claim contribution from complainant twice for the same money and twice for the representation of the claims in this bill described.* (Tr., p. 26.)

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* In Case No. 2535, instead of the matter above found in 82 and 83 there are the following allegations (references in this note are to transcript in that case):

82. That by the terms of said Notice of Forfeiture it is not disclosed that defendant Pack, or either of the other defendants, ever expended the sum of $100 on each or any of the said claims. (Tr., p. 30.)

83. That by said Notice of Forfeiture it is claimed by the defendant that $5600 was expended for annual representation of the 175 claims described in said Notice for 1911 and 1912, while in truth and in

84. Complainant has no means of knowing or ascertaining what, if any, amount of his own money or funds said defendant has expended on said claims, or on any of them, for annual representation work for 1911 and 1912. (Tr., p. 26.)

85. That the only method whereby complainant can procure said information is through this court, and by its order compelling defendant Pack to account for and disclose—

(a) Any and all moneys expended or spent by him on said claims, or on any of them, in

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fact the United States Statutes and the Statutes of the State of California require that $100 in labor or improvements be placed upon each separate claim for each separate year, and that $35,000 would be required by said statutes to fully represent each and all of said 175 claims for the two years, 1911 and 1912. (Tr., p. 30.)

83a. That it does not appear from said Notice of Forfeiture which particular claim or claims was represented by the defendants, if any were represented at all, either for 1911 or for 1912. (Tr., p. 31.)

83b. That it does not appear from said Notice of Forfeiture how much money, if any, the defendants expended in labor or improvements on any of said claims, either for 1911 or 1912. (Tr., p. 31.)

83c. That it does not appear from said Notice of Forfeiture—

(a) Whether the defendants expended $100 in labor or improvements on either of said claims either for 1911 or 1912, or—

(b) Whether the improvements on either of said claims were for 1911 or 1912, or—

(c) Whether the $5600 so claimed to have been expended by defendant Pack was expended on all of said claims, or—

(d) Upon which of said 175 claims, and if so expended, how much of the same was expended upon either or any of said 175 claims. (Tr., p. 31.)

83d. That simultaneously with the service of said Notice of Forfeiture on complainant, said defendants caused to be served on complainant two other and further pretended notices of forfeiture, by one of which defendant Pack, and each and all of said defendants, claimed that defendant Pack had expended $1200 on twelve of said 175 claims in the annual representation of said claims for 1911. (Tr., pp. 31-32.)

83e. That simultaneously with the service of said Notice of Forfeiture on complainant, said defendants caused to be served on said complainant two other and further pretended notices of forfeiture, by one of which defendant Pack, and each and all of said defendants, claimed that defendant Pack had expended $1400 on 44

1911 and 1912, for the purpose of representing the same for said years, if any money at all was so expended by defendant Pack for such purpose,—

(b) Whose money, if any, was expended by him,—

(c) How expended,—and

(d) What amount of the same, if any, was so expended and spent for labor and improvements upon said claims which could lawfully be counted, considered or applied as such

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of said 175 claims in the annual representation of said claims for 1912. (Tr., p. 32.)

83f. On information and belief that the $5600 that said defendants claim as having been expended by defendant Pack on said 175 claims in 1911 and 1912 is the same money and cash as the $1200 and the $4400 claimed to have been expended by defendant Pack in doing the annual representation work on said twelve claims for 1911 and said 44 claims for 1912, as set forth in said pretended notices of forfeiture. (Tr., pp. 32-33.)

83g. Therefore complainant claims that none of said defendants, and neither of them, are entitled to any contribution from this complainant. (Tr., p. 33.)

83h. That while complainant and his co-locators were engaged in the performance of annual representation on said 175 claims for 1912, they were forcibly prevented from completing said annual representation on the whole of said 175 claims by the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or by each and all of said corporations, or by their, or each of their agents, employees, representatives, servants or attorneys. (Tr., p. 33.)

83i. That the employees of complainant and his co-locators, and the persons representing complainant and his co-locators in doing said annual representation on said 175 claims for 1912, were—

(a) Forcibly ejected and driven from said claims by said Foreign Mines and Development Company, the American Trona Company, the California Trona Company, or by each and all of them, or by their or each of their agents, representatives, employees, servants, or attorneys, and—

(b) Threatened with great physical violence and injury in case they or any of them returned to said claims, or any of them, or attempted to place on said claims, or any of them, any labor or improvements in the annual representation thereof for 1912. (Tr., pp. 33-34.)

83j. Complainant therefore claims that none of said defendants are entitled to any contribution from complainant for annual representation of said 175 claims, or either of them, for 1912. (Tr., p. 34.)

representation work, and for the expenditure of which he would be entitled to pro rata contribution from this complainant. (Tr., pp. 26-27.)

86. Complainant hereby and herewith offers and stands ready to pay to defendant Pack or these defendants, his proportionate share of any money belonging to defendant Pack which this court finds were expended by defendant Pack on said claims or any of them, as annual representation work thereon for 1911 and 1912, if the court finds he so expended any money at all for such purpose. (Tr., p. 27.)

87. That if defendants are allowed to proceed under said Notice of Forfeiture, they will, at the expiration of ninety days from and after the day of service of said Notice—

(a) File and record copy of said Notice and an affidavit of service with the County Recorder of San Bernardino County, State of California,—

(b) Claim and assert that all complainant's right in said claims has been duly and legally forfeited and extinguished,—

(c) Thereby and by means thereof a cloud will be cast upon the title of complainant in said claims, and—

(d) Complainant will be compelled to institute and prosecute a great number of suits to remove said clouds at a great and exhorbitant expense. (Tr., pp. 27-28.)

88. That unless defendants are enjoined and restrained from proceeding to declare the forfeiture of complainant's right in said claims, as claimed in their said Notice of Forfeiture, this complainant will be compelled to institute, prosecute and maintain a multiplicity of suits in order to remove the cloud cast upon his said title in and to the said claims. (Tr., p. 28.)

89. That complainant has no plain, speedy or adequate remedy at law in the premises. (Tr., p. 28.)

90. That unless defendants are restrained and enjoined from declaring a forfeiture of all complainant's right, title and interest in said claims, pursuant to and in accordance with the Notice of Forfeiture, complainant will be irrevocably and irreparably damaged and injured, and be defrauded or deprived of all his right in said claims. (Tr., pp. 28-29.)

A temporary restraining order, an injunction pendente lite and a permanent injunction are prayed for as well as an accounting. (Tr., pp. 29-30.)

The bills are verified, not by complainant, but by one Henry E. Lee. Lee's connection with the litigation does not appear. He gives as his reason for verifying the bill the fact that complainant is without the State of California. (Tr., pp. 30-31.)

At the time that the bills were filed, the District Court, basing its action on the verification of the bills, made its temporary restraining order in each

of these cases directed to the three defendants and appellants named in the bill. At the same time it also issued its order directed to the said appellants requiring them to appear on December 7th and show cause why the temporary restraining order should not be made an injunction pendente lite. (Tr., pp. 36-39.)

On December 8th, 1914, appellants appeared before the District Court and showed cause in law why the temporary restraining orders should not be made injunctions pendente lite. (Tr., p. 41.) The objections then made by solicitors of appellants as to the sufficiency of the bills were overruled by the District Court, which thereafter, and on the 11th day of December, 1914, made its order that injunctions pendente lite forthwith issue in each of the cases. (Tr., pp. 42-49.) Injunctions pendente lite following the terms of the temporary restraining orders, were accordingly issued and served upon appellants.

Thereafter, and within the time allowed by statute, the appellants herein took their said appeal from said order, to this Honorable Court. (Tr., p. 52.)

Specification of Error.

Appellants urge as error the action of the District Court in giving, making and entering its order of December 11th, 1914, by which the said court (1)

granted complainant's application for an injunction pendente lite, and (2) directed that such an injunction issue. (Tr., pp. 50-51.)

Appellants urge that the error of the District Court is one occurring at the very threshold of the case. That an injunction pendente lite has been issued upon a bill that fails to state facts sufficient to place complainant within equity jurisdiction in its broad sense. That even if the bill be assumed to state such facts sufficiently there is no competent proof thereof, of the character required to warrant injunctive relief.

Brief.

Appellants' case rests upon the following propositions:

I.

An injunction pendente lite must be supported by verified statements, as to essential facts, positive, certain and free from conclusions.

> *Post v. Beacon Vacuum Pump & Electrical Co.* (Circuit Court of Appeals, 4th Circuit, January 1898), 84 Fed. 371-373.
>
> "A bill seeking a result which may be so disastrous to the interests of other stockholders as this might be, if its principal prayer were granted, should support itself by decisive allegations. The general rule is that the essential part of a bill in equity should be stated positively and with precision. Story Eq. Pl. (10th Ed.), Secs. 255, 256. This is especially insisted on where a remedy is sought by an injunction

> or a rescission, the result of which may not only compensate the party injured, which is all the common law ordinarily gives, but may impair the interests of the adverse party to a vastly disproportionate extent. The underlying principle is stated in the following cases, although applied there from an aspect different from that at bar: Grymes v. Sanders, 93 U. S. 55, 62; U. S. v. American Bell Tel. Co., 167 U. S. 224, 241. The common law gives relief on a mere preponderance of proof; but it is certain that, in cases of the class we are considering, equity does not act unless the proofs are clear. The underlying reasons which require also that the allegations which the proofs are to sustain be clear to the effect that the complainant has suffered, or is threatened with, an injury so substantial as to demand, not only compensation, but also specific relief by rescission, even while this may cause a loss to others as to which his own would be comparatively trifling."

This Honorable Court, per Ross, Circuit Judge, has, in reversing an order granting an injunction pendente lite, affirmed the same doctrine in the case of *Anargyros & Company v. Anargyros* (Circuit Court of Appeals, 9th Circuit, February, 1909), 167 Fed. 753, 769, in the following language:

> "The well-established rule in equity is that a preliminary injunction should not be granted in a doubtful case."

In the case of *Gaines & Co. v. Sroufe*, 117 Fed. (Circuit Court N. D. Cal., December, 1901), 965, 967, Circuit Judge Morrow said:

> "It is the general rule that whatever is essential to the rights of the complainant (where the ground for relief by injunction is applied),

and is necessarily within his knowledge, ought to be alleged positively and with precision."

Also see:

Henry Gas Co. v. U. S., 191 Fed. 132, 136;
Owsley v. Yerkes, 185 Fed. 686;
Hall Signal Co. v. General Railway Signal Co., 153 Fed. 907, 908;
Star Co. v. Culver Pub. House, 141 Fed. 129;
Paul Stein System v. Paul, 129 Fed. 757, 760;
Shinkel v. Louisville Co., 62 Fed. 690, 692;
Russell v. Farley, 105 U. S. 433, 438;
10 Enc. of Pl. & Pr., pp. 992-3;
22 Cyc., pp. 953, 954;
Davitt v. American Bakers' Union, 124 Cal. 99, 101.

II.

Where a court's action in granting an injunction pendente lite is based upon a verified statement of facts a material one of which is not only uncertain, but is on information and belief, and not positive, such action rests upon an erroneous hypothesis of pertinent fact.

Anargyros & Co. v. Anargyros, 167 Fed. (Circuit Court of Appeals, 9th Circuit, Gilbert, Ross and Morrow, Circuit Judges, per Ross, Circuit Judge, February, 1909), 753, 769.

This Honorable Court in reversing an order of the District Court granting an injunction pendente lite, says in the above-referred to case (p. 769):

"Looking at the case as made by the pleadings and affidavits, we think the most that can be fairly claimed for the complainant is that it is a doubtful one. Under such circumstances the preliminary injunction should have been denied, and the temporary restraining order vacated."

Lake Shore & M. S. Ry. Co. et al. v. Felton, 103 Fed. (Circuit Court of Appeals 6th Circuit, Lurton, Day and Severens, Circuit Judges, per Severens, Circuit Judge, June, 1900), 227, 230.

"The answer, for the purposes of the motion for a preliminary injunction, may serve as an affidavit, and has only the same effect. The verification of the answer was by one of the solicitors, who made oath that 'the statements of the foregoing answer are true, as he verily believes'. There is no showing, however, that he had made such investigation of the facts as would enable him to speak with assurance, and his qualified statements rather imply that he had not, and there is no extrinsic showing of the contract. It seems to be settled that such a verification of the answer or of an affidavit is insufficient proof upon the hearing of a motion, either for an injunction, or to dissolve one already granted. Barb. Ch. Prac. 156; 2 High Inj. 1514, and the cases there cited; Campbell v. Morrison, 7 Paige, 157; Miller v. McDougall, 44 Miss. 682; Spalding v. Keeley, 7 Sim. 377."

Gaines & Co. v. Sroufe, 117 Fed. (Circuit Court N. D. Cal., December, 1901, Morrow, C. J.), 965, 966.

"The allegations of the bill upon information and belief are insufficient. Whatever is essen-

tial to the rights of the complainant, and is necessarily within its knowledge, ought to be alleged positively."

Willis v. Lauridson, 161 Cal. (1911), 106, 108.

"Before examining the complaint it may be well to state some established rules of law which must govern us in determining its sufficiency as a basis for the extraordinary remedy of injunction. Where the verified complaint is the basis for the relief sought, it takes the place of an affidavit and must be treated as such; and the facts so stated must stand the test to which oral testimony would be subjected. Averments which are but conclusions of law are not competent testimony, though they might stand as matter of pleading. Unless the statement, in the nature of a conclusion, is supported by the facts and circumstances on which it rests, it is insufficient to sustain an application for injunction."

In re United Wireless Telegraph Co., 201 Fed. (1912) 445, 449;

Murray Co. v. Continental Gin Co., 126 Fed. (1903) 533, 534;

Leavenworth v. Pepper, 32 Fed. (1887) 718, 719;

Chicago etc. Ry. Co. v. New York etc. R. Co., 24 Fed. (1885) 516, 519;

Brooks v. O'Hara, 8 Fed. (1881), 529, 532.

III.

There has been reversible error where a court in granting or continuing an injunction pendente lite:

(a) Has relied upon an erroneous hypothesis of pertinent fact, or

(b) Has relied upon an erroneous hypothesis of pertinent law, or

(c) Has improvidently exercised its legal discretion.

Argument.

Logical sequence is so markedly absent from the allegations of fact in the bills of complaint, that the application of some painstaking analysis is requisite to an intelligent grasp of the theories which the complainant and appellee apparently had in mind as warranting the interposition of special equitable functions.

Upon such analysis it appears that the theories embodied in the bills of complaint can be placed under one of two principal heads.

Under the first head come the theories where the complainant seeks injunctive relief because of alleged defects in the methods in which the defendants and appellants have pursued the forfeiture proceedings instituted by them.

Under the second, and more important, head may be grouped the appellee's theories that this case merits injunctive relief because the defendants and appellants have never had any actual right to institute the forfeiture proceedings inveighed against; and for the defendants to assert such right is for them to be guilty of fraud.

Discussion of the theories grouped under the second head, because more important, warrants first attention.

Appellee in his bill of complaint has pointed to six reasons which he believes to warrant his conclusion that the defendants and appellants have no right to demand contribution from complainant and appellee, and in the absence of contribution, to declare a forfeiture. These reasons may be summarized as follows:

1. Because the defendant and appellant Pack, who was the co-owner of the complainant, expending the money, contribution of complainant's portion of which is sought, in fact did not spend the $4400 adverted to in the Notice of Forfeiture described in the bill, or, if he did so spend it, did not properly spend it in the performance of annual assessment work. The allegations in the support of this theory will be found in greater particularity hereinabove in the statement of the contents of the bills in paragraphs 5, 6, 10 and 30 thereof, as to the non-expenditure of said money, and in paragraphs 10, 32 and 33, as to the improper expenditure of said moneys.

2. Because certain money, to wit, $2836, alleged to have been contributed, on behalf of complainant and his co-locators and the co-locators of the defendant Pack, to the defendant Pack to be by him used in the performance of said assessment work, has not been credited to complainant by the defendants in the forfeiture proceedings that they have

instituted against complainant. Reference is hereby made for the details of the allegations upon which this theory is based to paragraphs 74 and 75 of the statement of the contents of the bills herein, as to $1000 of said $2836, and to paragraphs 76, 77, 78, 79, 80 and 81 of said statement, as to the balance of $1836.

3. Because of the existence of an alleged combination and conspiracy between the defendants and appellants, on the one side, and the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, on the other side, to injure complainant and to defraud and deprive him of his interest in said mining claims, and to defeat the locations of complainant and his co-locators, including the defendant Pack. So nebulous and so confusing are the allegations of the bill in support of this theory, that it is necessary, for a greater detail, to look to a large number of the paragraphs in the statement of the contents of the bills herein, namely: as to the fact that the defendant Hutchinson took the conveyance from the defendant Schuler for the sole use and benefit of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, paragraphs 16, 17, 19, 20 and 21; as to the fact that the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company claim rights and interests in the mineral land covered by

the placer locations made and recorded by complainant and his co-locators, including the defendant Pack, paragraph 22; as to the fact that the Foreign Mines and Development Company, American Trona Company, and California Trona Company, have for some years last past been endeavoring to defeat the locations so made by complainant and his co-locators, including the defendant Pack, paragraph 23; as to the fact that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, have fraudulently attempted to procure defendant Pack's right in said claims for the purpose of using said interest to destroy complainant's right and to defraud complainant out of his interest in said claims, paragraph 24; as to the fact that the defendant Hutchinson has been acting as the agent, representative and attorney of said Foreign Mines and Development Company, American Trona Company, and the California Trona Company in endeavoring to deprive and defraud complainant of his right in said locations, paragraph 25; as to the fact that defendant Hutchinson, under the direction and orders of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, fraudulently obtained said transfer from the defendant Schuler in pursuance to the combination and conspiracy referred to, paragraphs 26 and 28; as to the fact that pursuant to said combination and conspiracy the defendants caused to be prepared and served on complainant

the Notice of Forfeiture complained of, paragraphs 27, 28 and 29.*

4. Because the defendant Pack's one-eighth interest in the mining claims, as successors to which the defendants Schuler and Hutchinson appear, was no longer, at the time of the institution of the forfeiture proceedings in any of the defendants, for the reason that (a) defendant Schuler had conveyed to one Shellito prior to her conveyance to defendant Hutchinson, who took with notice of defendant Schuler's conveyance to Shellito, or (b) for the reason that the conveyance from the defendant Schuler to the defendant Hutchinson was without consideration. Reference is made for further details as to the allegation that defendant Hutchinson had notice at the time he took the conveyance from the defendant Schuler, of the defendant Schuler's prior transfer to Shellito, to paragraphs 13, 14 and 15; as to the fact that the transfer from the defendant Schuler to defendant Hutchinson was without consideration, to paragraph 18.

5. Because the sums for which contribution is claimed from the complainant by the defendant Pack are made up of sums for which certain judgments have been rendered against the defendants Pack et al., which said judgments remain unpaid.

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* In case No. 2535 alone there are also allegations (see footnotes to paragraphs 82 and 83) that the Foreign Mines and Development Company, the American Trona Company and California Trona Company, in 1912, forcibly prevented complainant and his co-locators from completing their annual representation for that year on the 175 claims. Although not alleged that such prevention was part of the "combination and conspiracy", this character of averment seems logically to belong to none of the other theories embodied in the bill.

Reference is made for further particulars as to these allegations to paragraphs 34 to 73, both inclusive, of the statement of the contents of the bills hereinbefore found, and particularly to paragraphs 38, 46, 58, 68 and 72.

6. Because the sums for which contribution is claimed from the complainant by the defendant Pack are part of a sum of $5600 for which the defendant Pack claimed contribution from the complainant in a forfeiture proceeding entirely separate and distinct from the one referred to in the bill. Reference as to details of the allegations supporting this theory is hereby made to paragraphs 82 and 83 of the foregoing statement of the contents of the bills of complaint.

THEORIES RELIED UPON BY THE COURT TO SUPPORT ITS ORDER GRANTING INJUNCTION.

Reference to the opinion filed by the court at the time of making its order granting the injunction pendente lite (Tr., pp. 43-47) discloses the fact (Tr., p. 45) that the court considered theories hereinabove in this brief enumerated as 1 and 2, as determinative of complainant's right to injunctive relief.

While the opinion more particularly considers the bill of complaint on file in the case relating to 175 claims (Case No. 2535), the attitude of the court therein expressed as to the matters specifically under discussion is of equal application to both the present case (No. 2537) and No. 2536.

The court says (Tr., p. 45): "Plaintiff then alleges that the said Pack did not expend or cause to be expended of his own money, during the years 1911 and 1912, or at any other time, the sum of $5600, of which the said $700 was the one-eighth part, upon or for the benefit of said placer mining claims, or at all; that at least $2836 was contributed by plaintiff and his co-locators to the defendant Pack for the purpose of doing the assessment work upon the claims mentioned, for the years 1911 and 1912."

The only allegations in the bill upon which the opinion of the court in the first of these respects (i. e., alleged non-expenditure of money) can rest, are found in the foregoing statement of the contents of the bills in paragraphs 5, 6, 10 and 30 thereof. The first of these allegations is, it is true, positive in its terms, but is coupled with an important qualification: That Pack did not spend $4400 "of his own money or funds" (Tr., p. 7). Well separated from this allegation by averments entirely immaterial to this theory is found a subsequent allegation, upon information and belief "that the said Pack never, during the year 1911, or at any other time, expended * * * the sum of $4400 of his own funds or money, or any other sum or amount, in and upon said claims, * * * or any of them, for any purpose whatsoever." (Tr., pp. 14 and 15.)

Confusion as to just what the person verifying the bill does know to be true may well arise from

the different methods of treating two so similar averments. Nor does it simplify the dilemma to find in paragraph 10 (Tr., p. 9) an allegation upon information and belief "that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims * * * for the year 1912, expended a greater part or portion, or all of such money, in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said mining claims are located, and in furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported * * * for the purpose of performing said representation work during said year upon said claims".

Surely a positive assertion that defendant Pack did not spend his own funds is in no wise inconsistent with the fact that the said defendant Pack spent funds loaned to him or advanced to him, or on his behalf, by other persons. If the money was spent by Pack, so far as this complaint is concerned, he cannot take exception to a demand by Pack for contribution for such expenditure. If no money whatever was spent by Pack why does the complainant, who seeks the aid of equity to deprive Pack, or at least to delay him in the assertion of a substantial right (see *Badger etc. Co. v. Stockton etc. Co.,* 139 Fed. 838, 841-2), not bring forth a verified statement in proof thereof? This omission might be laid upon the head of a careless pleader, were it not for the added doubt occasioned by the

second line of attack which presupposes the expenditure by Pack of the funds, but assails it as not properly made. Such verified statements present the testimony of one whose lack of accuracy arouses suspicion as to his motives rather than sympathy for him as a slovenly pleader.

Another feature calling for a most careful scrutiny is the verification attached to the bill of complaint taken in connection with the two above-referred to statements, one positive, and one on information and belief as to the same matter. The affiant Lee in the verification takes oath (Tr., pp. 30, 31) that "he has personal knowledge of all the facts and matters therein (in the complaint) alleged, and knows them to be true, except as to those matters therein alleged upon information and belief, and as to them, he believes them to be true". Such an affiant, face to face with conclusive proof that the defendant Pack had in truth spent $1400 of his own funds upon the claims, could find escape from his embarrassment in the similarity of the positive averment to the one upon information and belief. According to his verification he only believes to be true the matter alleged upon information and belief. If certain matter occurs in the complaint upon information and belief he has but given to the court his testimony as to what his belief is as to that matter. And that same matter, regardless of how many times it may appear in the complaint, or in how many forms, is only testimony as to belief. It is not as though an affiant had said in so many words "I positively swear that

Pack did not spend any money of his own"; and had then said, "Upon information and belief I swear that Pack did not spend any money at all." In this case there is a significant distinction; it is said "On information and belief I swear that defendant Pack did not spend any of his own money or any money at all." In other parts of the bill the same matter recurs without, it is true, having before it the statement that it is on information and belief, but at the same time without having before it the statement that it is meant to be positively asserted as the personal knowledge of the affiant.

It is to guard against just such evasions and equivocations that there are these equity rules:

That bills must show candor and frankness.

Moffat v. County Commissioners, 97 Md. 266, 270; 54 At. 960, 962;

Lamm v. Burrell, 69 Md. 272, 274-6; 14 At. 682, 683-4;

McDowell v. Biddison, 120 Md. 118, 125; 87 At. 752, 755;

Blackwells Durham Tobacco Co. v. American Tobacco Co., 145 N. C. 367, 369; 59 S. E. 123, 128.

That where there are contradictory or inconsistent allegations the equity will be tested by the weaker rather than by the stronger allegation.

Godwin v. Phifer, 51 Fla. 441, 454; 41 So. 597, 601;

Camp v. Matheson, 30 Ga. 170.

That allegations must not be argumentative.

Mead v. Stirling, 62 Conn. 586, 596;

Battle v. Stephens, 32 Ga. 25;

Stinson v. Ellicott City etc. Co., 109 Md. 111, 116; 71 At. 527, 529;

1 High on Injunctions (4th Ed.), sec. 34.

And paramount to these rules, both because of the dignity of the courts in which it prevails, and because of its long and well-defined existence, is the rule that

> "such a verification (on information and belief) * * * of an affidavit is insufficient proof upon the hearing of a motion either for an injunction or to dissolve one already granted."

Lake Shore and M. S. Ry. Co. v. Felton, Circuit Court of Appeals, 6th Circuit, June 15, 1900, Lurton, Day and Severns, Circuit Judges, per Severens, Circuit Judge, 103 Fed. 227 at 230;

In re United Wireless Telegraph Co., 201 Fed. (1912) 445, 449;

Murray Co. v. Continental Gin Co., 126 Fed. (1903) 533, 534;

Leavenworth v. Pepper, 32 Fed. (1887) 718, 719;

Chicago etc. Ry. Co. v. New York etc. R. Co., 24 Fed. (1885) 516, 519;

Brooks v. O'Hara, 8 Fed. (1881) 529, 532.

FAILURE TO CREDIT COMPLAINANT'S ADVANCES.

The sum of $2836 referred to in the court's opinion as having been contributed by complainant and his co-locators to the defendant Pack, for which Pack has failed to credit complainant, is made up of two sums. One of these is $1836; the other $1000. (See paragraphs 74 to 81, statement of contents of bills, Tr., pp. 24, 25.)

The form in which the complainant has presented his proof of the payment of the $1836 is hardly calculated to inspire boundless trust in the artless candor of the pleader; nor can it fail to arouse the keenest admiration at what now appears, not as familiarity with the books on pleading, but as a refinement of crafty legerdemain. By this magic the pleader would transmute before the eyes of the unwary and credulous the dross of the evidentiary fact, a mere written evidence of indebtedness, into the more substantial metal of ultimate fact, a bona fide debt due, owing and, it is to be inferred, unpaid from the defendant Pack to complainant and his co-locators.

The pleader says: Prior to December 1911 the defendant Pack "duly acknowledged in writing that he was indebted to one Henry E. Lee (presumably the same Lee who verified complainant's bill), the duly authorized agent of plaintiff and his co-locators". The pleader does not say that the defendant Pack was indebted to Lee and that the indebtedness was at that time due, owing and unpaid. Most assuredly had this been the case, Affiant Lee

might well have set forth the ultimate fact concerning Creditor Lee. Had this been done more substance would have been lent to the allegation following, that "said Lee, acting as such agent for plaintiff and his co-locators, directed the said defendant Pack to use and utilize all of *said money,* or so much thereof as might be necessary, in the annual representation of the placer mining claims * * * for the years 1911 and 1912, and that the said defendant Pack agreed with the said Lee that he would so utilize and use *said money*". To what does "*said money*" refer? Certainly its existence as "said money" sprang from the written acknowledgment of indebtedness, and from nothing more. Nor is the doubt as to the parentage of "said money" dispelled in the subsequent averment that "said money and indebtedness was money due and owing to this plaintiff and his co-locators from the said defendant Pack, *duly evidenced by his written acknowledgment of such indebtedness to the said Lee, the duly authorized agent of this plaintiff and his co-locators*". Such care! Such clearness! How circumspectly Affiant Lee sets forth the acts of Agent Lee and the acts of Creditor Lee!

The balance of the sums said to have been contributed by complainant and his co-locators to the defendant Pack is named as $1000. (See paragraphs 74 and 75 of the statement of the contents of the bills; Tr., p. 24.) The allegation of the bill as to the fact of the payment of this sum is definite and clear. Its form throws into vivid relief the

inadequacy of the allegations concerning the alleged payment of the $1836. For once Affiant Lee states in so many words that Agent Lee, as the duly authorized agent and representative of this plaintiff, and of his co-locators, paid to the said defendant Thos. W. Pack, for this plaintiff, and for his said co-locators, in their respective proportionate shares, the sum of $1000, as a portion of their pro rata contribution, for the doing of said actual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said actual assessment work thereon". But from this point on there is a lapse again into the realm of uncertainty. Says Affiant Lee: "That as plaintiff is informed and believes, the said Thos. W. Pack did so use the said sum of $1000 for said purpose in said year."

If the fatally defective form of such an averment ("The correct form of averment is that set forth in *Story Eq. Pl.* (8th Ed.), p. 249, viz: 'That plaintiff has been informed and believes, and therefore avers' "; *Wyckoff v. Wagner Typewriter Co.,* 88 Fed. 515, 517; *Murray Co. v. Continental Gin Co.,* 126 Fed. 533, 534) does not open the allegation to destructive criticism, the conspicuous absence of any averment that the defendant Pack has not properly credited to complainant and his co-locators the $1000 paid him, renders the relevancy and therefore the potency of the averment as to the payment of little value.

CONCLUSIONS AS TO THE THEORY OF FAILURE TO CREDIT.

Even if, for the sake or argument, fullest credit be given to all the complainant's allegations in support of the theory of failure to credit, it is, with the greatest deference, difficult to see how such averments warrant the conclusion that an injunction should issue. Admit that $2836 had been actually paid to the defendant Pack. By the terms of the bill it was paid to him on behalf of complainant and his co-locators, who include the defendant Pack himself. The payment of such a sum would amount to a contribution on the part of each of eight locators, including the defendant Pack, of $354.50. By the terms of the bill the contribution was made for the performance of assessment work for 1911 and 1912. In case No. 2536 it appears that the defendant Pack claims to have expended $1200, or $150 for each locator, and this case, No. 2537, $4400, or $550 for each locator. Case No. 2536 applies to the work for 1911; case No. 2536 applies to the work for 1912. It therefore appears that the defendant Pack claims to have expended $700 for each locator for both 1911 and 1912; $150 for 1911 and $550 for 1912. As against this sum the complainant has, at best, made out a contribution of $354.50, on the part of each locator, for both 1911 and 1912, or a difference in defendant Pack's favor of $345.50. It cannot be denied that the defendant Pack has the right to pursue forfeiture proceedings and by them enforce the payment by his co-locators of at least this sum, or, upon their default, to acquire their

interests thereby. Even assuming that a court of equity would be warranted in restraining the completion of forfeiture proceedings, under such circumstances, where the amount as to which the co-locator is delinquent is actually paid into court, no such payment has been made in the present cases. Furthermore, there are no facts alleged by the complainant to show in what proportion the amount said to have been contributed by the complainant and his co-locators was to be applied to 1911 and to 1912.

INTERFERENCE WITH PERFORMANCE OF ASSESSMENT WORK.

The court's opinion, as has been noted, was filed in case No. 2535, in which the bill of complaint attacked the forfeiture proceedings as to 175 claims. In that bill alone occurs the allegation upon which the following portion of the court's opinion rests:

> "It is also alleged that in the year 1912, while plaintiff and his co-locators were engaged in the performance of the annual assessment work upon said claims, they were forcibly prevented from completing the said assessment work, and were forcibly ejected and driven from said claims, by the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company."

While it may be necessary, therefore, to consider these allegations with reference to the bill relating to the 175 claims, they are not before the court in

either the present case, No. 2537, or in Case No. 2536.*

OTHER THEORIES.

By dint of a careful combing of the bill of complaint and a rearrangement of the allegations therein, it is possible to discern four additional theories which have as their basis the proposition that the defendants never have had any right to institute forfeiture proceedings. The District Court does not touch upon these in its opinion. Doubtless they have been ignored because of their patent insufficiency. They will, therefore, be passed upon most briefly here.

There may be mentioned the allegations as to the existence of an alleged combination and conspiracy between the defendants, on the one side, and the Foreign Mines Development Company, the American Trona Company, and the California Trona Company, on the other side, to injure complainant and to defraud and deprive him of his interest in said mining claims. It is difficult to point to any precise allegation as to the existence of such a combination and conspiracy. There are, however, certain acts alleged to have been done by

* These allegations in their application to case No. 2535 betray no relation of relevancy to any of the various theories of the bills. From the averments it appears that complainant and his co-locators, who at that time necessarily included the defendant Pack, were the victims of the asserted interference. No community of interest in the interference is alleged to have existed between the companies involved and the defendants. Even the pleader's conclusions as to the performance of the acts in pursuance of a "combination and conspiracy", which are liberally applied to other acts set forth in the bills, are lacking here.

one or more of the defendants pursuant to such a combination and conspiracy, which we may ssume, for the sake of argument, to have been alleged in these general terms to exist. The allegations as to these various acts recur at such frequent intervals in the bill as to become a monotonous formula. In each of them the portentous words, "combination and conspiracy", stand alone, without the support of particulars. There occurs, following the allegations that the defendant Schuler had conveyed the interest in the claims which she derived from the defendant Pack to one Shellito prior to her transfer to the defendant Hutchinson, and that the defendant Hutchinson took from the defendant Schuler with knowledge of her prior transfer, the statement that the defendant Hutchinson took the conveyance in pursuance of a combination and conspiracy (Tr., pp. 10 and 11). Immediately following this we find the same matter repeated upon information and belief (Tr., p. 11). Aside from questions as to its materiality, the inadequacy of the form in which this fact is presented seems obvious.

There occurs the allegation mentioned in the District Court's opinion, that the defendant Hutchinson, if he acquired any title at all from the defendant Schuler, holds the same for the benefit of the Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them (Tr., pp. 10 and 11). The paragraph in which this is found commences with the statement that "The

plaintiff further alleges upon his information and belief." It is, therefore, matter of doubt as to whether or not the allegation itself, following in the same paragraph, is not also meant to be upon information and belief. Here, again, are the objections of both immateriality and defective presentation.

There occurs an allegation, in entire keeping with the clearness of the complainant's other allegations, that the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company "claim rights and interest in and to the mineral lands covered by said placer locations" (it does not appear that these rights are claimed adversely to the complainant and his co-locators), and "for some years last past have been endeavoring to defeat the complainant's locations" (Tr., p. 12).

Following this the pleader has departed from his rule of leaving one in doubt as to the sufficiency of his allegation. He has inserted an averment, beyond argument fatally defective, to the effect that "the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have * * * as plaintiff is informed and believes, fraudulently attempted to procure the right, title and interest of defendant Pack in * * * said locations * * * for the express purpose * * * of using the said interest * * * in such a way * * * as to destroy all of plaintiff's right therein, and to defraud plaintiff

out of all interest in * * * said claims" (Tr., p. 12).

There is immediate return, in that plaintiff "further alleges on like information and belief", to the safer paths of mere uncertainty. This allegation concerns the fact that defendant Hutchinson has been acting as the agent of the three above-named companies in endeavoring to deprive and defraud plaintiff of his rights in said mining locations (Tr., p. 13).

Following this there occur allegations of the following acts: That the defendant Hutchinson, under the direction and orders of the three companies, fraudulently obtained transfer from the defendant Schuler; and that the three defendants caused the Notice of Forfeiture to be served. All this in pursuance of the combination and conspiracy. This matter is laboriously repeated, as though the proper pleading of a combination and conspiracy depended upon the number of times the words appear within a given space (Tr., pp. 13 and 14). Some of the strength of this argument, however, is taken from it by the fact that one of the repetitions is upon information and belief (Tr., p. 14).

These charges are followed by confusion more pretentious as to length. It constitutes seven pages (Tr. pp. 15-24) devoted to the histories of five actions pending in the Superior Court of the State of California, in which the defendant Hutchinson appears as attorney for plaintiff in each case. It appears that in two of these actions defendant

Pack figured as a defendant, and in the other three the defendant Schuler. By paraphrasing the allegations of the complaints in these various actions, the complainant asserts that the claim upon which each one of them was founded was for either goods or services furnished to Pack in the performance of annual assessment work upon the mining claims in dispute. It is alleged that judgments have been obtained in some of these actions which are still unpaid, and that the amounts of these judgments and the amounts involved in the other actions constitute part of the amounts claimed by the defendant Pack in his Notice of Forfeiture to have been expended by him. This latter allegation, in each instance, is based upon information and belief. Such comment should suffice.

So much for the additional theories of this class which diligence discloses in the bills.

With respect to the theories discernible in the bill and based upon the proposition that the methods pursued by the defendants in prosecuting their forfeiture proceedings are defective, little need be said. They all turn upon a fancied need for equitable interposition to prevent the use, in clouding complainant's title, of notices of forfeiture fatally defective upon their face. The mere statement of such a theory is sufficient to destroy it. No cloud can be cast upon title by an instrument or proceeding that is defective upon its face. The allegations in this connection are found in the Transcript beginning on page 8 thereof.

ASPECT OF THE SITUATION UPON APPEAL.

The eyes of an appellate court reviewing the action of a District Court in granting an injunction pendente lite, are directed chiefly upon two inquiries: First, has the District Court "proceeded upon an erroneous hypothesis of pertinent fact or law"? Second, has the District Court "improvidently exercised its legal discretion"?

> *Acme Appliance Co. v. Commercial etc. Co.,* (Circuit Court of Appeals, 6th Circuit), 192 Fed. (December, 1911) 321, 323.

In the pursuit of the first of these inquiries there come before the appellate court the bills in these cases as they stand alone, their material allegations uncontroverted. Unless it can be said, after examination of these bills, that the hypothesis of pertinent fact which the District Court erected as the structure to support its injunctions is without material flaw, the action of that court should be reversed.

It has been pointed out wherein the bills as a whole are woefully deficient in logical theory upon which the complainant has proceeded. Still more deficient, because of its incompetency, is the evidence brought forward in support of each theory.

As a foundation for each theory, testimony, in the form of positive verified statements of fact, is necessary. In no single one of the theories advanced by the complainant, is every fact material thereto upheld by such testimony. If these premises are correct, the conclusion cannot but follow

that any judicial action which rests upon any one of these theories rests upon an erroneous hypothesis of pertinent fact. This conclusion once properly reached calls into action in these cases the corrective authority of the appellate court.

In the case of *St. Louis Street Flushing Machine Co. v. Sanitary Street Flushing Machine Co.* (Circuit Court of Appeals, 8th Circuit, April, 1908), 161 Fed. 725, the same weakness as appears in the present record was presented to the appellate court. The case was one which came before the appellate court on appeal from an order granting a preliminary injunction. An injunction had issued upon a bill showing an infringement of complainant's patent. The appellate court at some length first discusses the improvident exercise, in the issuance of the injunction, of the District Court's legal discretion, upon the situation as presented by the entire record. It then goes on to say:

> "For another reason, also, the preliminary injunction ought not to have been granted. It is a fundamental principle that injunctions ought not to issue unless the right alleged to be invaded or threatened is clear. As said in Truly v. Wanzer, 5 How. 141, 12 L. Ed. 88, 'There is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and necessary remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted

only by the protecting, preventive process of injunction.' The affidavits in support of and against the motion for injunction leave the existence of the available license relied on by complainant in grave doubt and uncertainty, too doubtful and uncertain, at least, to warrant interference with the status quo, until the right can be deliberately ascertained and declared at final hearing.

"The order awarding the preliminary injunction was improvidently made. It must, therefore, be reversed and the cause remanded, with direction to deny the motion. It is so ordered."

Again, in *Henry Gas Co. v. United States* (October, 1911), the Circuit Court of Appeals in the 8th Circuit (191 Fed. 132, 136), in considering an appeal from an order granting an interlocutory injunction, on which appeal the order was reversed, said:

"Upon these facts the Circuit Court granted a preliminary injunction against the defendant as prayed in the bill; and the sole question for determination is, was it rightly granted?

"The granting of or refusal to grant a preliminary injunction rests in the sound judicial discretion of the court; but it is a cardinal principle of equity jurisprudence that it will not be granted unless the right to it is clear, the injury impending, and threatened so as to be averted only by the preventive process of injunction (*Truly v. Wanzer,* 5 How. 141, 142; 12 L. Ed. 88; St. Louis Street Flushing Machine Co. v. Sanitary Flushing Machine, 161 Fed. 725-728), or the case is such that the status quo should be maintained until the final hearing. (City of Newton v. Levis, 79 Fed. 715-718; Denver & R. G. R. R. Co. v. United States, 124 Fed. 157-161.)"

This Honorable Court, per Gilbert, Circuit Judge, has expressed its view, as to the effect on appeal, of the lower court's disregard of the facts or of the principles of equity applicable to the case, in the following language:

> *Alaska Pacific Ry. & Terminal Co. v. Copper River and N. W. Ry. Co.,* (9th Circuit, 1908), 160 Fed. 862-865:
>
> "The office of a preliminary injunction is to preserve the subject of the controversy in its present condition, in order to prevent the perpetration of a wrong or the doing of an act whereby the subject of the controversy will be materially injured or endangered, until a full investigation of the case may be had, and a preliminary injunction will never be granted unless from the pressure of an urgent necessity. The damage threatened, and which it is legitimate to prevent, during the pendency of the suit, must be, in an equitable point of view, of an irreparable character (16 Am. & Eng. Enc. of Law, 345). And the rule is well settled that the granting or withholding of an injunction pendente lite ordinarily rests in the sound discretion of the court to which the application is made, and the ruling thereon is not subject to reversal in an appellate court, *unless there has been abuse of discretion evidenced by a disregard of the facts or of the principles of equity applicable to the case.* Vogel v. Warsing, 146 Fed. 949, and cases there cited."

CONCLUSION.

We respectfully urge in conclusion that in the three cases now before the court there are presented two errors on the part of the District Court:

1. (a) The erroneous hypothesis of pertinent fact upon which the lower court proceeded in the issuance of the injunction pendente lite upon unverified material facts;

(b) The erroneous hypothesis of pertinent law in the issuance of the injunction upon the assumption that the case presented the equity necessary to warrant injunctive relief.

2. The improvident exercise by the District Court of its legal discretion in disregarding the cardinal equity principle that complainant for an injunction must present a case free from doubt.

Appellants therefore respectfully urge a reversal of the order granting injunctions pendente lite in Cases Nos. 2535, 2536, 2537, together with appellants' costs on these appeals incurred.

Dated, San Francisco,
January 22, 1915.

Respectfully submitted,

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